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In the Supreme Court of the United States

OCTOBER TERM, 1991

SAUDI ARABIA, ET AL., PETITIONERS

v.

SCOTT NELSON AND VIVIAN NELSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Foreign Sovereign Immunities Act confers jurisdiction over a suit by a United States citizen against a foreign state alleging that the foreign state recruited him in this country for overseas employment and then imprisoned and tortured him on account of his employment-related activity in the foreign state.

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

Petitioners Kingdom of Saudi Arabia, King Faisal Specialist Hospital (a Saudi-owned health care facility), and Royspec (a Saudi-owned purchasing agency), seek review of a court of appeals judgment holding that the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. 1330, 1603 *et seq.*, confers jurisdiction over a lawsuit filed by respondents Scott and Vivian Nelson. The Nelsons, who are American citizens, filed an action in the United States District Court for the Southern District of Florida seeking damages resulting from the Saudi government's

arrest and alleged mistreatment of Scott Nelson in 1984, while he was employed by the King Faisal Specialist Hospital in Saudi Arabia. The district court dismissed the Nelsons' suit, rejecting their contention that the FSIA confers subject matter jurisdiction to adjudicate the dispute. Pet. App. 18a-25a. The court of appeals reversed, holding that the FSIA confers jurisdiction because the Nelsons' suit is "based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. 1605(a)(2). Pet. App. 1a-17a.

1. The FSIA provides the "sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434, 443 (1989). Enacted in 1976, the FSIA provides the courts with objective criteria to determine whether suits against foreign states shall proceed. The FSIA replaces the prior ad hoc approach in which the courts deferred to what was sometimes perceived as the Executive Branch's desires based on foreign policy objectives rather than legal principles. See *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486-488 (1983).

The FSIA gives the United States district courts original subject matter jurisdiction over nonjury civil actions against a foreign state, including suits by foreign plaintiffs, as to claims for relief with respect to which the foreign state is not entitled to immunity under Sections 1605 through 1607 of the FSIA (28 U.S.C. 1605-1607). 28 U.S.C. 1330(a). See *Verlinden*, 461 U.S. at 489. The FSIA further provides that the district court shall have personal jurisdiction over the foreign state as to those claims in which service of process has been made in accordance with the FSIA. 28 U.S.C. 1330(b).

The crucial inquiry is the scope of the foreign state's immunity. Section 1604 of the FSIA states the general rule:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. 1604. Sections 1605 through 1607 provide exceptions to that general rule that essentially codify the "restrictive" principle of foreign sovereign immunity. *Verlinden*, 461 U.S. at 487-488.[1]

Section 1605(a) of the FSIA provides that a foreign state is not entitled to immunity if, among other things, the foreign state waives it, 28 U.S.C. 1605(a)(1), or if the state engages in commercial activity having a prescribed relationship to the United States. See 28 U.S.C. 1605(a)(2). Specifically, a foreign state is not immune from suit in any case in which the action is "based upon":

> (i) "a commercial activity carried on in the United States by the foreign state";
>
> (ii) "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere"; or
>
> (iii) "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."

28 U.S.C. 1605(a)(2).[2] Section 1605(a)(5) further provides that a foreign state shall not be immune from other actions

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[1] Under the restrictive immunity principle, foreign nations and their instrumentalities can be sued in "cases arising out of a foreign state's strictly commercial acts," but not for actions "involving the foreign sovereign's public acts." *Verlinden*, 461 U.S. at 487.

[2] The FSIA's definitions state:

> (d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular

where "money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment." 28 U.S.C. 1605(a)(5). See *Argentine Republic*, 488 U.S. at 439-441.[3]

2. Saudi Arabia owns and controls the King Faisal Specialist Hospital, a health care facility located in Riyadh, Saudi Arabia. It also owns and controls Royspec, the hospital's purchasing agent, which buys American medical supplies through an office located in this country. Beginning in 1973, Saudi Arabia contracted with an independent non-Saudi company, the Hospital Corporation of America (HCA), to recruit Americans for employment at the King Faisal Specialist Hospital. In 1983, while in the United States, Scott Nelson saw and answered an HCA advertisement for a position with that hospital. He attended a job interview in Saudi Arabia, returned to the United States, and signed an employment contract in Miami, Florida to work as a Monitoring Systems Engineer. Nelson attended a brief HCA orientation program in the United States. In December 1983, he began

transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. 1603(d) and (e).

[3] Section 1605(a)(5) provides that this provision shall not apply to:

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion is abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

28 U.S.C. 1605(a)(5)(A) and (B).

working at the King Faisal Specialist Hospital in Riyadh. Pet. App. 3a, 11a, 18a-19a.

The Nelsons' complaint arises from events that occurred during his employment in Saudi Arabia. The complaint alleges that on March 20, 1984, Scott Nelson discovered certain unspecified safety hazards while performing his job duties in monitoring facilities at the King Faisal Specialist Hospital and that Nelson reported those hazards to hospital officials and a Saudi government commission. Compl. ¶¶ 9, 10. The complaint further alleges that on or about September 27, 1984, "[a]s a direct and proximate result of these actions," Scott Nelson was summoned to the hospital security office, arrested by Saudi government agents, and imprisoned for 39 days, during which period he was interrogated, beaten, tortured, and held incommunicado. Compl. ¶¶ 11, 12. The complaint also alleges that a Saudi agent informed Nelson's wife that he could be released if she provided sexual favors. Compl. ¶ 13. See Pet. App. 4a, 19a.[4]

The Nelsons' complaint asserts, in total, 16 causes of action against petitioners. The causes of action fall into three basic categories. First, the Nelsons assert in Counts 1, 9, and 13 of the complaint that the petitioners negligently failed to warn Scott Nelson that Saudi officials "have, and sometimes exercise, the power to have persons summarily arrested, detained, and physically abused, without legal cause." Compl. ¶¶ 15, 48, 68. Second, the Nelsons allege in Counts 2 through 7, 10, 11, 14, and 15 that petitioners committed various intentional torts against Scott Nelson. Third, the Nelsons assert in Counts 8, 12, and 16 spousal "derivative" claims alleging that Vivian

[4] Petitioners dispute those allegations. They admit that Nelson was arrested, but they allege that he was arrested on charges that he falsified his employment credentials by submitting a forged diploma. Pet. 4; Pet. App. 16a, 19a n.1.

Nelson sustained damages as a result of the foregoing alleged wrongs.[5]

3. Petitioners moved the district court to dismiss the Nelsons' complaint for lack of subject matter jurisdiction under the FSIA. The district court granted that motion. Pet. App. 18a-25a. The court noted that "[t]he parties agree that the only exception to immunity that might apply in this case is § 1605(a)(2), clause 1." Pet. App. 20a. That provision, the court stated, required the court to resolve two questions: "first, did any of the [petitioners] carry on commercial activities having substantial contact with the United States, and second, are any of Nelson's claims based upon those commercial activities." *Id.* at 21a.

The district court found that the "only commercial activities allegedly undertaken in this country by Saudi Arabia and [King Faisal Specialist Hospital] * * * relate to Nelson's recruitment" and that a separate corporation—HCA—actually conducted those activities. Pet. App. 21a. The court concluded that even if the Saudi government's involvement with HCA amounted to an agency relationship, "the link between the recruitment activities and the [petitioners] is not sufficient to establish 'substantial contact' with the United States." *Id.* at 21a-22a (quoting 28 U.S.C. 1603(e)). The court observed that the FSIA's legislative history gave various examples of "substantial contact," but none of those examples resembled the situation here. Pet. App. 22a-23a.[6]

[5] The complaint asserts eight of the 16 claims specifically against Saudi Arabia: negligence (Count 1); battery (Count 2); unlawful detainment (Count 3); wrongful arrest and imprisonment (Count 4); inhuman torture (Count 5); disruption of normal family life (Count 6); mental anguish (Count 7); and a spousal derivative claim (Count 8). The complaint asserts four essentially identical claims against the Hospital and Royspec: negligence (Counts 9 and 13); battery (Counts 10 and 14); false imprisonment (Counts 11 and 15); and a spousal derivative claim (Counts 12 and 16).

[6] The Nelsons also sued HCA in a separate action. See Pet. App. 19a n.2. That suit was dismissed under the statute of limitations and for contributory negligence stemming from Scott Nelson's submission of the falsified diploma to obtain Saudi employment. *Nelson* v. *Hospital Corp. of America*, No. 88-0484-CIV-Nesbitt (S.D. Fla. Nov. 1, 1990). The Eleventh Circuit affirmed that decision without opinion. *Nelson* v. *Hospital Corp. of America*, 946 F.2d 1546 (1991) (Table).

The district court reached a different conclusion with respect to Royspec. Acting as King Faisal Specialist Hospital's purchasing agent, Royspec had engaged in commercial activity in the United States. Pet. App. 23a. The court concluded, however, that the Nelsons' complaint was not "based on" Royspec's commercial activity. *Ibid.* See 28 U.S. 1605(a)(2). The court explained that "[t]he only connection between Royspec and Nelson is that Nelson was given Royspec's phone number in Maryland as a way for his family to contact him in the event of an emergency." Pet. App. 23a. The court found "absolutely no nexus between Royspec's business and the torts alleged in Nelson's complaint," *id.* at 23a-24a, and additionally stated that "even if the court had determined that [King Faisal Specialist Hospital] and Saudi Arabia had carried on commercial activities having substantial contact with the United States through the indirect recruitment activities, the court would be unable to find a nexus between those activities and Nelson's complaint," *id.* at 24a.

4. The court of appeals reversed. Pet. App. 1a-17a. It concluded "that, on the facts presented, the recruitment and hiring of Nelson in the United States was a 'commercial activity' of the Saudi government, and that Nelson's subsequent detention and torture were 'based upon' Nelson's recruitment and hiring in the United States." *Id.* at 17a. The court of appeals reasoned that Saudi Arabia engaged in a commercial activity having substantial contact with the United States by contracting with HCA to act as Saudi Arabia's agent in recruiting Americans to work at the King Faisal Specialist Hospital. *Id.* at 11a-12a. The court further reasoned that "the detention and torture of Nelson are so intertwined with his employment at the Hospital that they are 'based upon' his recruitment and hiring, in the United States, for employment at the Hospital in Saudi Arabia." *Id.* at 15a.

Although the court of appeals did not squarely address the question, it apparently concluded that the King Faisal Specialist Hospital is also subject to suit. The court specifically held that Royspec was subject to suit, because Royspec maintains an office in Maryland and acts as purchasing agent for the Hospital, and because Nelson was given Royspec's telephone number so that his family could contact him and Nelson received telegrams concerning his employment bearing the telex designation "ROSPEC." Pet. App. 16a-17a.[7]

DISCUSSION

This Court should grant the petition for a writ of certiorari. The scope of the FSIA's commercial activity exception is a matter of considerable practical importance. The court of appeals' decision employs an unworkable ad hoc standard in determining whether a legal action is "based upon" a commercial activity, and it compounds the already substantial confusion among the lower courts in applying the "based upon" requirment. The importance of the issue is heightened in cases, as here, where the lawsuit implicates the foreign state's exercise of law enforcement activity within its own borders. This Court should review the court of appeals' decision and clarify the governing principles.

1. The court of appeals concluded that the Nelsons' action was "based upon a commercial activity carried on in the United States by the foreign state," 28 U.S.C. 1605(a)(2), because the Nelsons alleged a factual relationship between the Saudi recruitment activity and Nelson's detention and alleged mistreatment:

> In the case of Nelson, however, we find that the detention and torture of Nelson are so intertwined with his employment at the Hospital that they are "based upon" his recruitment and hiring, in the United States, for employment at the Hospital in Saudi Arabia.

Pet. App. 15a. The precise content of the court's test, which it describes as a "nexus" requirement, *id.* at 12a, 13a, 16a, is unclear. At most, the court of appeals' decision appears to require only that the commercial activity be a link in the chain of events that leads to a plaintiff's injury.[8] It may require even less.[9] In either event, the court of appeals' essentially ad hoc test is not anchored in the statutory text, and it does not provide a clear, predictable, or objective standard for ascertaining when a foreign state is subject to suit "based upon" its commercial activities.

The court of appeals' decision perpetuates the long-standing confusion among the courts concerning the commercial activity exception's "based upon" requirement. The courts of appeals have recognized that there must be a connection between the commercial activity and the plaintiff's cause of action, but they have provided little articulation and no clear consensus as to the precise nature of that required connection. For example:

- The Second and Third Circuits have concluded that the "based upon" standard is satisfied if there is some factual "nexus" between the commercial

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[7] Petitioners filed a petition for rehearing and suggested rehearing en banc. The United States filed a statement of interest as amicus curiae supporting petitioners. Pet. App. 29a-48a. The court of appeals denied the petition. *Id.* at 26a-27a.

[8] The court of appeals seems to have reasoned that Scott Nelson was recruited in the United States for the job of "detecting and reporting safety violations," he was arrested "as a result of those actions," and his arrest and mistreatment therefore "resulted from and were directly attributable to [his] employment." Pet. App. 16a. The court of appeals also stated that Saudi Arabia's argument that Saudi officials arrested Nelson based on his submission of a forged diploma "in effect admits the nexus between Nelson's recruitment in Florida and his detention and torture in Saudi Arabia, and supports Nelson's claim of subject matter jurisdiction." *Ibid.*

[9] The court of appeals concluded that Royspec was subject to suit merely on the basis that Nelson was given Royspec's telephone number and he received four telegrams regarding his employment that bore a telex designation—"ROSPEC"—that is similar to Royspec's business name. Pet. App. 17a.

activity and the plaintiff's grievance. *Barkanic* v. *General Admin. of Civil Aviation*, 822 F.2d 11, 13-14 (2d Cir.) (allowing a wrongful death action against a Chinese airline arising from a crash in China, where the airline sold the ticket in the United States through a nonexclusive sales agent), cert. denied, 484 U.S. 964 (1987), on appeal after remand, 923 F.2d 957 (2d Cir. 1991); *Sugarman* v. *Aeromexico, Inc.*, 626 F.2d 270, 272-273 (3d Cir. 1980) (allowing a tort action against a Mexican airline for delays at a Mexican airport where the airline sold the ticket in the United States through a nonexclusive agent for roundtrip travel to Mexico).

- The Fourth Circuit has stated that there must be a "material" connection between the commercial activity and the plaintiff's cause of action. See *Gerding* v. *Republic of France*, 943 F.2d 521, 527 (1991) (dismissing a wrongful death action arising from an American employee's illness aboard a French vessel, where the vessel had previously docked in the United States and the "Chef de Mission" attended meetings there, but did not request the medical records of American employees), petition for cert. pending, No. 91-956 (filed Dec. 4, 1991).

- The Fifth Circuit has purported to adopt the Third Circuit's "nexus" approach. *Vencedora Oceanica Navigacion, S.A.* v. *Compagnie Nationale Algerienne de Navigation (C.N.A.N.)*, 730 F.2d 195, 202 (1984) (dismissing a Panamanian vessel owner's action against Algeria for tortious deprivation of the vessel where the vessel was seized in the Mediterranean Sea and Algeria conducted no related business in the United States). That court has since stated, however, that the connection must be "material," *Stena Rederi*

AB v. *Comision de Contratos*, 923 F.2d 380, 387 (1991), and that the "focus should be on the elements of the cause of action itself," *Callejo* v. *Bancomer, S.A.*, 764 F.2d 1101, 1109 (1985).

- The Sixth Circuit has required "a connection between [the commercial] activity and the act complained of in the lawsuit." *Gould, Inc.* v. *Pechiney Ugine Kuhlmann*, 853 F.2d 445, 452 (1988) (remanding for further discovery an unfair competition suit against a French-owned corporation whose United States agent allegedly discussed but did not consummate an arrangement to acquire trade secrets). In an appeal after remand, that court has further stated that the "jurisdictional element is the commercial activity * * * plus a theory, a gravamen, that the plaintiff's injuries arise from the commercial activity." *Gould, Inc.* v. *Mitsui Mining & Smelting Co.*, 947 F.2d 218, 221 (1991) (affirming denial of motion to dismiss), cert. dismissed, 112 S. Ct. 1657 (1992).

- The Seventh Circuit has stated that "a claim is 'based upon' events in the United States if those events establish a legal element of the claim." *Santos* v. *Compagnie Nationale Air France*, 934 F.2d 890, 893 (1991) (dismissing a negligence action where the plaintiff, an employee of a French-owned airline, was injured by a fellow employee in France).

- The D.C. Circuit has stated that the "based upon" standard is satisfied if the plaintiff demonstrates a "direct causal connection" between the commercial activity and his suit *or* if the commercial activity is "an element of the cause of action under whatever law governs his claims." *Zedan* v. *Kingdom of Saudi Arabia*, 849 F.2d 1511, 1514 (1988) (dismissing an employee's breach of

contract action where the employee was originally recruited in the United States). See also *Gilson* v. *Republic of Ireland*, 682 F.2d 1022, 1027 n.22 (D.C. Cir. 1982).

In short, the courts have failed to agree on a clear principle to guide the inquiry. The variety of verbal formulations represents genuine uncertainty concerning the application of the "based upon" requirement and has led to inconsistent results. See also *Rush-Presbyterian-St. Luke's Medical Center* v. *Hellenic Republic*, 877 F.2d 574, 582 n.10 (7th Cir.) (collecting additional cases), cert. denied, 493 U.S. 937 (1989); *Vencedora Oceanica Navigacion*, 730 F.2d at 200-201 (same).[10]

The longstanding confusion among the lower courts concerning the precise content of the "based upon" requirement presents an important question that is ripe for this Court's resolution. The question is especially important in the context presented here because it determines the justiciability of a suit between a foreign state and a citizen of the forum state arising from the foreign state's exercise of law enforcement powers within its own territory. The Nelsons' complaint specifically alleges that Scott Nelson was arrested and detained by law enforcement officers because of his actions in Saudi Arabia. Compl. ¶¶ 10, 11. Although petitioners and the Nelsons dispute, as a matter of fact, the grounds for his arrest and the nature of his treatment while in custody, there is no dispute that this case implicates Saudi Arabia's exercise of law enforcement authority within its borders.

[10] Thus, the Nelsons are mistaken in contending that "the present case is one of those happy instances where many different judges have read the same statute in exactly the same way." Br. in Opp. 9. Neither the courts nor commentators agree with that assessment. See, *e.g.*, *Vencedora Oceanica Navigacion*, 730 F.2d at 200 (noting the "widely varying formulations of the jurisdictional scope of this clause"); G. Born & D. Westin, *International Civil Litigation in United States Courts* 369 (1989) (observing that the "lower courts have reached divergent results" in applying the "based upon" requirement). Indeed, the court of appeals and the district court reached contradictory results in this case.

Whatever the factual merits of the Nelsons' claims, such suits are matters of particular sensitivity among sovereign nations.[11]

2. The court of appeals' interpretation of the FSIA's commercial activity exception is unsatisfactory, because it ignores the precise language of this carefully drafted statute and it fails to articulate a workable, objective standard for applying that provision. The FSIA, by its terms, sets forth the key concepts. The first clause of the commercial activity exception (which is the only clause at issue here) confers jurisdiction if: (a) the foreign state has "carried on" a "commercial activity" in the United States; and (b) the legal action is "based upon" that activity. 28 U.S.C. 1605(a)(2). Thus, this clause allows a suit against a foreign state only if the complaint identifies a commercial activity of the foreign nation *and* the complaint states a cause of action based on *that* activity.

a. The FSIA's definitions provide pertinent guidance in determining whether a foreign state has carried on a commercial activity in the United States. First, the FSIA defines the term "commercial activity" to include "a regular course of commercial conduct or a particular commercial transaction or act," and it specifically directs that the "commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. 1603(d). See Amicus Brief for the United States in *Republic of Argentina* v. *Weltover, Inc.*, No. 91-763 (argued Apr. 1, 1992). Second, the FSIA defines the phrase "commercial activity carried on in the United States by a foreign state" as "commercial

[11] The issue presented here is important for the additional reason that it may affect the scope of the United States' sovereign immunity in foreign courts. Foreign relations depend to a large extent on reciprocal treatment between sovereigns. If United States courts invoke the FSIA's commercial activity exception to review how foreign states exercise police powers within their own borders, foreign courts may similarly elect to review the United States' exercise of police powers within its borders.

activity carried on by such state and having substantial contact with the United States." 28 U.S.C. 1603(e).

In this instance, the question whether petitioners engaged in a commercial activity arises on a pretrial motion to dismiss and must be judged on the basis of the Nelsons' untried allegations. According to those allegations, Saudi Arabia entered into a contract with HCA (a non-Saudi corporation) to recruit individuals in this country for overseas employment at the Saudi-owned King Faisal Specialist Hospital. If Saudi Arabia utilized HCA as its agent, then Saudi Arabia effectively "carried on" that recruiting activity in this country. See 1 Restatement (Second) of Agency § 1 (1958) (defining an agency relationship).[12] Furthermore, the recruitment of hospital employees is a "commercial activity" within the meaning of the FSIA. HCA engaged in a recruitment activity no different than a commercial hospital might engage in, extending contractual offers of employment to perform non-sovereign, health-care-related services. On the basis of those allegations, Saudi Arabia carried on a commercial activity in the United States.[13]

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[12] Under familiar principles of agency law, a principal may be liable for the actions of an agent empowered to act on the principal's behalf and under its control. See, *e.g.*, 1 Restatement (Second) of Agency § 144 (1958). Thus, if the foreign state employs an agent to carry on an activity in the United States, then the foreign state may be held to have "carried on" the activity itself. The court of appeals stated that the contract between Saudi Arabia and HCA "created an agency relationship." Pet. App. 11a. The district court, however, did not resolve that question, which raised a "factual issue." *Id.* at 21a-22a. Because the district court has not resolved the issue, we treat the Nelsons' allegation of an agency relationship as true.

[13] It is not clear that King Faisal Specialist Hospital has carried on a commercial activity in this country. As the court of appeals recognized, the Kingdom of Saudi Arabia—and not King Faisal Specialist Hospital—contracted with HCA to recruit employees for the hospital. Pet. App. 3a, 11a. See Notice of Filing in Support of Plaintiffs' Memorandum in Opposition to Defendant Royspec's Motion to Dismiss Complaint (S.D. Fla. June 29, 1989), Exh. 2 (agreement between the Royal Cabinet of the Kingdom of Saudi Arabia and HCA). Petitioners do not dispute that Royspec, as purchasing agent for the hospital,

b. That, however, is not the end of the inquiry. The FSIA requires that the Nelsons' action be "based upon" the foreign state's commercial activity in this country. 28 U.S.C. 1605(a)(2). The FSIA does not define the term "based upon," but its meaning is readily discernible from the statutory context: A lawsuit is "based upon" a commercial activity if the commercial activity provides the basis for the cause of action. The application of that concept is straightforward in the typical case of commercial contracts. If a foreign state promises to perform a commercial contract in this country, the foreign state's commercial undertaking gives rise to a legally enforceable obligation and provides the basis for a cause of action for breach of contract if the foreign state fails to perform.[14]

In this case, the Nelsons do not allege a breach of Scott Nelson's employment contract.[15] Instead, the Nelsons allege that petitioners have committed various torts. The

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carries on commercial activity in the United States. As we explain below, however, that activity appears to have no relationship to the Nelsons' complaint.

[14] This approach is consistent with the examples provided in the congressional reports on the legislation. See H.R. Rep. No. 1487, 94th Cong., 2d Sess. 17, 18-19 (1976). In addition, this approach is consistent with the House Report's description of how the "based upon" requirement applies to the second clause of the commercial activity exception, which allows suits "based upon * * * an act performed in the United States in connection with a commercial activity of the foreign state elsewhere." 28 U.S.C. 1605(a)(2). The House Report states that "the acts (or omissions) encompassed in this category are limited to those which in and of themselves are sufficient to form the basis of a cause of action." H.R. Rep. No. 1487, *supra*, at 19.

[15] Significantly, the employment contract (which is between King Faisal Specialist Hospital and Scott Nelson and provides for performance in Saudi Arabia) states that in the case of any dispute arising from this contract, the Saudi courts, authorities, or commissions only will have jurisdiction. See Pet. App. 24a n.4. The employment contract is attached as an exhibit accompanying an affidavit filed with Royspec's motion to dismiss the complaint for lack of jurisdiction. See Declaration of Ali S. Al-Shabrami (Mar. 1, 1989).

FSIA allows a complainant to invoke the commercial activity exception in a tort action.[16] As in contract actions, however, the foreign state's commercial activity in this country must provide the basis for the cause of action.

The commercial activity involved here—Saudi Arabia's recruitment of Scott Nelson to work at its overseas hospital—does not provide a basis for the intentional injury and related spousal derivative claims that the Nelsons assert in their complaint. The Nelsons do not allege that the Saudi authorities *recruited* Scott Nelson in this country with the intent to injure or imprison him. Under familiar tort principles, the Saudi recruiting activity plainly does not provide the basis for a cause of action based on intentional injury, because the recruiting activity was not undertaken with the intention to cause the alleged harm. See, *e.g.*, 1 Restatement (Second) of Torts §§ 13 and 14 (battery), 21 (assault), 35 (false imprisonment) (1965). And because the recruitment activities do not provide a basis for the intentional injury claims, it cannot support Vivian Nelson's related spousal derivative claims.[17]

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[16] Section 1605(a)(5) of the FSIA (which this Court has described as the exception for "noncommercial torts," *Argentine Republic*, 488 U.S. at 439) indicates by implication that the commercial activity exception may embrace tort actions. It provides an exception from immunity in specific tort actions "not otherwise encompassed in paragraph (2) above"—viz., the commercial activity exception. See 28 U.S.C. 1605(a)(5). Thus, the FSIA contemplates that when a foreign state conducts a commercial activity, it is subject to the same types of tort suits that a private business would encounter. See also H.R. Rep. No. 1487, *supra*, at 17 (noting that the commercial activity exception encompasses actions based on "business torts occurring in the United States").

[17] As we have indicated (note 13, *supra*), it appears that King Faisal Specialist Hospital did not carry on any commercial activity in the United States. There is accordingly no basis for suit against that entity. In the case of Royspec, its only involvement with Nelson was the provision of a telephone number that his family could use to reach

The Nelsons' negligence claims should be analyzed in the same way. We do not understand Saudi Arabia to dispute that when it conducts recruitment activity in this country, it must comply with federal and state law governing the activity, including standards of conduct enforced through tort law. Thus, if Saudi Arabia somehow breaches a duty of reasonable care in its recruitment activity, it may be subject to suit for negligence. See generally 2 Restatement (Second) of Torts §§ 281, 282, 298 (1965). Because of its mistaken interpretation of the FSIA's "based upon" requirement, the court of appeals did not address whether the Nelsons' allegations concerning the Saudi *recruiting* activity provide the basis for a state law negligence cause of action.[18]

The question whether Florida law provides a basis for the Nelsons' negligence claims is perhaps best addressed in future proceedings, after this Court clarifies that any negligence claim must be "based upon," and not simply causally related to, the Saudi recruiting activity. We note, however, that there appears to be no principle of tort law holding that Saudi Arabia is under a legal obligation to warn prospective employees that Saudi law enforcement practices differ from American practices. Although American tort law recognizes that a party may be liable for intentional or negligent misrepresentations con-

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him in the case of an emergency. That action plainly does not provide a basis for the causes of action alleged here.

[18] The Seventh Circuit's *Santos* decision employed an analysis similar to the approach that we advocate, stating that "if the plaintiff claims a breach of a duty that arose within the United States, jurisdiction is present." 934 F.2d at 894. The Seventh Circuit suggested that the Eleventh Circuit's outcome in *Nelson* was consistent with its approach, but the Seventh Circuit failed to identify the "duty that arose within the United States." *Ibid.* The Seventh Circuit presumably did not review the specific content of the Nelsons' complaint in light of Florida law, and hence was in a poor position to evaluate that question.

cerning a commercial transaction, we have found no legal principle imposing a legal duty on a foreign state to warn prospective employees about how the foreign state might exercise its police powers.[19] Indeed, the creation of such a duty—which would require a foreign state to forecast how it might discharge its sovereign prerogatives—would create tension with the underlying principle of restrictive sovereign immunity, which posits that a foreign state retains immunity with respect to its sovereign "public acts." See *Verlinden*, 461 U.S. at 487.[20]

In sum, although the Nelsons have adequately alleged at this juncture that Saudi Arabia carried on a commercial

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[19] For example, American courts generally recognize that "one who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information." 2 Restatement (Second) of Torts § 311 (1965); see also 3 *id.* § 552 (negligent misrepresentation involving pecuniary loss). Nevertheless, and notwithstanding the substantial number of Americans who are employed overseas, we have discovered no case where an employer (whether governmental or private) was subject to liability based on a failure to warn a prospective overseas employee about the character of foreign law. Cf. *Arango* v. *Guzman Travel Advisors*, 761 F.2d 1527 1536 & n.10 (11th Cir.) (expressing doubt "whether Florida law would obligate an airline to ensure that its passengers were aware that they might not be permitted to enter a foreign nation"), cert. denied, 474 U.S. 995 (1985); *Jones* v. *Petty Ray Geophysical Geosource, Inc.*, 722 F. Supp. 343, 345 (S.D. Tex. 1989) (failing to reach the issue whether a foreign state was obligated to warn an employee "of danger from nearby insurgents").

[20] The enforcement of such a duty to warn through the FSIA's commercial activity exception would be especially anomalous, because the FSIA's noncommercial tort exception specifically retains the foreign state's immunity with respect to the actual exercise of such sovereign powers. The noncommercial tort exception does not encompass: "(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. 1605(a)(5).

activity in the United States, the Nelsons' legal action does not appear to be "based upon" that activity within the meaning of the FSIA. The court of appeals' contrary conclusion has the effect of subjecting a foreign state to the jurisdiction of a United States court concerning a matter that the FSIA places outside the authority of those courts. This Court should review that decision and clarify the governing principles.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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